

The Honorable Kymberly K. Evanson

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ETEROS TECHNOLOGIES USA, INC.; and
AARON MCKELLAR, a citizen of Canada,

Plaintiffs,

v.

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, a department of the
United States government;

UNITED STATES CUSTOMS AND BORDER PROTECTION, the United States Department of Homeland Security;

HARMIT S. GILL, Area Port Director, United States Customs and Border Protection for Blaine, Washington.

Defendants.

Case No. 2:25-cv-00181-KKE

**DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE
IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

Noted for Consideration:
May 19, 2025

Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss argues that this case is not moot and that this Court has jurisdiction to review Plaintiffs' claims. As discussed below, that is simply not the case – nor does Plaintiff Aaron McKellar's ("McKellar") recent attempt to enter the United States change the analysis. There are no live claims for this Court to review. McKellar is no longer subject to a removal order, he is not currently in removal proceedings pursuant to 8 U.S.C. § 1229a, nor has he sought any kind of waiver of inadmissibility since the

DEFENDANT'S REPLY
[Case No. 2:25-cv-00181-KKE] - 1

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1 expedited removal order (“ER”) was rescinded. Even if any of those scenarios were present, this
 2 Court would still not have jurisdiction to review Plaintiffs’ claims or provide the requested relief.
 3 As a result, this Court should dismiss Plaintiffs’ Complaint in its entirety.

4 **I. This Court Does Not Have Jurisdiction to Provide the Relief Plaintiffs Seek.**

5 The relief sought in Plaintiffs’ Complaint focused primarily on the issuance of the
 6 Expedited Removal Order (“ER”) in October 2024, the related five-year ban to entering the United
 7 States, and U.S. Customs and Border Protection’s (“CBP”) determination that McKellar is
 8 inadmissible to the United States. *See* Dkt. 1, pp. 20-22. Those claims are moot, as McKellar is
 9 no longer subject to an ER. McKellar is not detained by the United States, and he has no pending
 10 immigration-related proceedings.

11 Plaintiffs are effectively asking this Court to render an advisory opinion as to McKellar’s
 12 admissibility to the United States at a future border encounter. Not only is that question not ripe
 13 for adjudication, but this Court lacks jurisdiction to address it.¹ *See* 8 U.S.C. § 1252(e)(5); *see*
 14 *Vivint, Inc. v. Mayorkas*, 614 F. Supp. 3d 993, 1005 (D. Utah 2022).

15 **A. Expedited Removal Order**

16 In Plaintiffs’ Opposition to Defendants’ Motion to Dismiss (Dkt. 22), Plaintiffs argue that
 17 this case is not moot because the legal issues are “capable of repetition, yet evading review,” assert
 18

19 ¹ McKellar recently attempted to enter the United States via air. *See* Dkt. 22-1, McKellar Decl.
 20 at p. 12 ¶ 17. CBP interviewed him as part of its preclearance operations at Vancouver
 21 International Airport and concluded that he was inadmissible. *See* Dkt. 22-1, McKellar Decl. at
 22 pp. 12-13 ¶ 17-19; *see* Dkt. 22-1, Exhibit E at p. 73. McKellar decided to withdraw his request
 23 for admission. *See* Dkt. 22-1, McKellar Decl. at p. 13 ¶ 20; *see* Dkt. 22-1, Exhibit F at pp. 76-77.
 That encounter is not part of the Complaint, *see* Dkt. 1, or this lawsuit, nor are there any live claims
 related to that encounter as McKellar withdrew his application for admission and he is not in U.S.
 custody. *See* Dkt. 22-1, Exhibit F at pp. 76-77.

1 that the Government's decision to vacate the expedited removal did not "automatically" moot the
 2 case under the "voluntary cessation doctrine," and claim that the harm is ongoing because at a new
 3 encounter, CBP concluded that McKellar was inadmissible (on April 29, 2025) when he attempted
 4 to board a flight to reenter the United States.² *See* Dkt. 22, pp. 10-21.

5 A dispute qualifies for the exception to the mootness doctrine for a controversy that is
 6 capable of repetition, yet evading review "only if (1) the challenged action is in its duration too
 7 short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable
 8 expectation that the same complaining party will be subjected to the same action again." *United*
 9 *States v. Sanchez-Gomez*, 584 U.S. 381, 391 (2018) (internal quotation marks and citations
 10 omitted); *Qureshi v. Sanders*, 563 F. Supp. 2d 1154, 1157 (C.D. Cal. 2008) (recognizing that
 11 "capable of repetition" exception to mootness arises only in "exceptional" situations).³ Plaintiffs
 12 have not demonstrated that either of these exceptions apply to this case – and even if they did, the
 13 Court would still lack jurisdiction to review Plaintiffs' claims, as they were unreviewable even if
 14 the ER remained in place. *See* Dkt. 19, pp. 8-15.

15 While Defendants cannot make any representations or speculate as to what may occur at
 16 any future border encounters involving McKellar (or any individual, for that matter), as they are
 17 conducted based on the facts at the time of the encounter, McKellar is currently not subject to an
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19 ² Plaintiffs assertion that McKellar is "banned from travel to the [United States]" is not accurate.
 20 *See* Dkt. 22 at p. 13. Each time someone presents themselves for inspection, CBP must make an
 21 independent admissibility analysis based on the facts known to the inspecting officer at that time.
 22 *See* 8 USC § 1225(a). An applicant for admission's admissibility is subject to change at any time
 23 based on his representations to the inspecting officer, his business associations, or criminal history.
 24 Such a determination is made by CBP in its discretion at the time admission is being sought.

³ Plaintiffs only assert arguments as it pertains to the second (repetition) prong.

1 ER or an associated five-year ban from entering the United States. Plaintiffs have not
 2 demonstrated that any new encounters will “evade review,” as there is no way to ascertain what
 3 kind of review would be available unless/until new or ripe legal issues arise. Because every
 4 encounter is factually distinct, the same factual scenario is unlikely to be repeated because each
 5 time an alien presents at the border, they are subject to a new inspection and determination of
 6 admissibility at that time. *See* 8 USC § 1225(a).

7 Defendants also disagree that the “voluntary cessation doctrine” exception applies to
 8 counter Plaintiffs’ mootness argument. In good faith, Defendants reevaluated McKellar’s June
 9 2024 border encounter and decided to rescind the order and the associated five-year ban precluding
 10 McKellar’s reentry into the United States.⁴ As set forth in Defendants’ motion to dismiss, this
 11 Court would have lacked jurisdiction to review Defendants’ claims even if the ER remained. *See*
 12 8 U.S.C. § 1252(a)(2)(A); 8 U.S.C. § 1252(e)(5).

13 **B. McKellar’s Admissibility to the United States**

14 This Court does not have jurisdiction to review any decision regarding McKellar’s (or any
 15 other Eteros employee’s) admissibility to the United States. The Supreme Court has recognized
 16 that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute
 17 exercised by the Government’s political departments largely immune from judicial control.” *See*
 18 *Dep’t of State v. Munoz*, 602 U.S. 899, 907–08 (2024) (internal citations omitted). In this case,
 19 McKellar is currently not subject to a removal order, nor does he have pending removal
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21
 22 ⁴ In taking this action, CBP did not make any concessions about the legality of the ER. In addition,
 23 CBP did not restore McKellar’s NEXUS border crossing privileges, which remains a discretionary
 24 decision made by CBP, and also unreviewable by this Court. *See* Dkt.19, pp. 14-15.

1 proceedings. Plaintiffs attempt to preemptively litigate issues that may arise in a future removal
 2 proceeding, and this Court lacks jurisdiction to address such claims. *See* 8 U.S.C. § 1252(b)(9)
 3 (“Judicial review of all questions of law or fact ... arising from any action taken or proceeding
 4 brought to remove an alien from the United States ... shall be available only in judicial review of
 5 a final order [of removal]....”); 8 U.S.C. § 1252(a)(5) (“[A] petition for review filed with an
 6 appropriate court of appeals ... shall be the sole and exclusive means for judicial review of an order
 7 of removal....”). Moreover, any declaration by this Court that CBP’s inadmissibility finding(s) are
 8 unlawful would be an advisory opinion which is Constitutionally prohibited. *See McQuillion v.*
 9 *Schwarzenegger*, 369 F.3d 1091, 1095 (9th Cir. 2004); *see also Vivint, Inc.*, 614 F. Supp. 3d at
 10 1005; *but cf.*, *Gill v. Mayorkas*, No. C20-939 MJP, 2021 WL 3367246, at *8-9 (W.D. Wash. Aug.
 11 3, 2021) (refusing to extend consular nonreviewability jurisdictional bar to an inadmissibility
 12 determination).

13 Because Defendants do not believe this is the appropriate forum to address the merits of
 14 Plaintiffs’ challenge to McKellar’s admissibility determination(s) or that this Court has jurisdiction
 15 to do so, Defendants do not intend to do so here. However, it is important to point out that Plaintiffs
 16 continue to conflate trade law with immigration law. The claims being asserted in Plaintiffs’
 17 Complaint relate to McKellar’s *admissibility* to the United States, not whether Eteros or McKellar
 18 as an employee of Eteros can legally *import* items to states where such importation comports with
 19 relevant state laws.⁵ Specifically, Plaintiffs continue to reference a *limited* determination made by
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22 ⁵ Plaintiffs also refer to Eteros employee Amanda James and her individual immigration
 23 proceedings. *See* Dkt. 22, p. 8. While Ms. James is employed by Eteros, she is not a named party
 24 to this lawsuit. Any claims she may have in her individual capacity are not before this Court.

1 the Court of International Trade (citing *Eteros Techs. USA, Inc. v. United States*, 592 F. Supp. 3d
 2 1313, 1332 (Ct. Int'l Tr. 2022)) as it relates to their importation of *specific* goods into *specific*
 3 states – in that decision, through the Port of Blaine, Washington – with federal immigration law.⁶
 4 See Dkt. 22, pp. 26-27. The Court of International Trade did not declare McKellar admissible to
 5 the United States, nor does it have any authority to do so; as explained above, only the Executive
 6 Branch can make that determination. *Munoz*, 602 U.S. at 907–08.

7 **C. Due Process Claim**

8 Plaintiffs' due process claim is unsupported, and not viable in this cause of action.
 9 Defendants reiterate that Eteros has no constitutionally protected right for its employees to enter
 10 the United States – and McKellar similarly does not possess such a right. *Landon v. Plasencia*,
 11 459 U.S. 21, 32 (1982). Foreign nationals applying for admission at the border thus lack any
 12 constitutional due process rights with respect to admission: “[w]hatever the procedure authorized
 13 by Congress is, it is due process as far as an alien denied entry is concerned.” *Shaughnessy v.*
 14 *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). “It is not within the province of any court,
 15 unless expressly authorized by law, to review [that] determination.” *United States ex rel. Knauff*
 16 *v. Shaughnessy*, 338 U.S. 537, 543 (1950).

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 23 ⁶ To the extent this Court concludes it has jurisdiction over such claims, Defendants will brief the
 issue at the appropriate time.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1).

DATED this 19th day of May, 2025.

Respectfully submitted,

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I certify that this memorandum contains 1992 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of Immigration Litigation, Civil Division, U.S. Department of Justice, and of such age and discretion as to be competent to serve papers.

I further certify that on today's date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the Defendants, who are CM/ECF participants.

DATED this 19th day of May, 2025.

s/ Jaclyn E. Shea

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